American Armored Car, LTD. *and* United Federation of Security Officers, Inc. Cases 2–CA–33316, 2–CA–33359, and 2–CA–33376

July 11, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On December 31, 2001, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

The Discharges of Leonard Miles and John Verderber

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Leonard Miles and John Verderber because of their union activities. We affirm the judge's finding that the General Counsel met his burden under *Wright Line*[4] to prove that the employees' union activities were a motivating factor in the Respondent's decision to discharge them. However, we find, as explained below, that the Respondent proved it would have discharged the two employees even if they had not engaged in union activities. Accordingly, we reverse the judge's unlawful discharge finding with regard to these two employees.

A. The Facts

The Respondent operates an armored car service. Miles and Verderber were guard-drivers. They were both involved in the Union's organizing campaign during September and October 2000.[5] They were discharged in October for refusing to take a polygraph test. Approximately 2 weeks after their discharge, the Board conducted an election among the Respondent's employees, on November 2.

The chain of events that culminated in the discharges began in mid-July when one of the Respondent's customers—a restaurant—notified the Respondent that the Respondent had picked up a bag containing over $25,000 in cash from the customer on June 26 for delivery to the customer's bank and that the money had not been deposited at the bank.

Respondent's director of security, James Carson, conducted an investigation of the customer's claim, which disclosed the following. On June 26, the Respondent's employees picked up the bag from the customer and delivered it to the Respondent's JFK airport facility. Later that evening, other Respondent employees transferred the bag to the Respondent's Elmsford facility. On the morning of June 27, Miles (acting on behalf of his three-man armored truck crew) signed for several property items including the $25,000 bag which Miles' truck was scheduled to deliver to the customer's bank that day. Miles' truck (manned by Miles, Verderber, and guard-driver Mark Garafolo) drove its route on June 27, and Miles cleared "pay-in" procedures at the Elmsford facility vault that evening (indicating that Miles—again acting on behalf of his three-man truck crew—either turned in the bag or turned in a signed receipt showing delivery to the bank).

After notification by the customer of the missing money, Carson searched the Elmsford facility vault. He did not find the bag but did find the receipt that had accompanied it. The receipt had a preprinted line for signature by the receiving institution—in this case, the bank; but there was no signature on the line. Also, the yellow copy of the three-ply receipt—which copy is to be given to the receiving institution—was still attached to the receipt. The lack of a receiving institution signature and the presence of the yellow copy indicated that the bag had not been delivered to the bank.

The Respondent makes many deliveries to banks and, occasionally, a bag intended for one bank is left at a dif-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] We affirm the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Fernando Miranda. Chairman Battista does not reach the issue of whether the Respondent gave Miranda permission to be absent on September 26, 2000. Chairman Battista finds that, assuming the Respondent did not give Miranda permission to be absent, the Respondent's discharge of Miranda constituted disparate treatment relative to the discipline imposed on other employees for comparable misconduct.

[3] We adopt the judge's recommended Order as modified and set forth in full below. We modify the notice in accordance with *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001).

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] All dates are in 2000, unless otherwise specified.

ferent bank by mistake. In such cases, the bank that mistakenly received the bag would eventually realize the mistake and notify the Respondent. Carson initially assumed that this was the case with the missing $25,000 bag. During the next 2 months, Carson repeatedly telephoned banks that might have mistakenly received the bag, asking if they had found the missing bag. None did.

In October, with the $25,000 still missing, Carson discussed the matter with Anthony Palmiotto, the Respondent's insurance broker who specialized in the armored car industry. Palmiotto encouraged Carson to pursue the investigation and, particularly, to establish that the Respondent's employees were not criminally responsible for the bag's disappearance. A common practice in the armored car industry when property is missing is to polygraph employees who had access to the missing property. Carson decided to polygraph the Respondent's employees regarding the missing bag.

Carson telephoned Ed Torian, an experienced private investigator and polygraph examiner who had administered prehire and investigatory polygraphs for the Respondent for several years. Torian suggested to Carson that the Respondent polygraph the employees who worked on the truck on June 27 and in the vault later the same evening. Carson identified the six employees (Miles, Verderber, Garafolo, and three vault employees) who fit Torian's criteria, and decided to polygraph them.

On October 16, Carson called Verderber at home and directed him to come to the Elmsford facility to take the polygraph test. Verderber initially agreed, but said he did not want to drive to the facility that evening. He asked to take the polygraph several days later. Carson agreed to Verderber's request.

On October 17, Carson spoke to Miles at the Elmsford facility. Carson told Miles that Miles had to take a polygraph regarding the missing bag. Miles refused to take the polygraph. Carson then discharged Miles.[6]

On October 18, Verderber telephoned Carson. Verderber told Carson that he had decided to not take the polygraph. Carson then discharged Verderber.[7]

Carson ordered Garafolo and the three vault employees to take the polygraph. They each took the polygraph and continued to be employed by the Respondent.

[6] Miles asked Carson if he could have an attorney present during the polygraph. Carson initially refused the request. Carson advised polygrapher Torian of Miles' request and Torian approved it. Carson then told Miles that Miles could have an attorney present. Miles still refused to take the polygraph.

[7] The parties stipulated that the Respondent discharged Verderber on October 19; however, Carson and Verderber testified that the discharge occurred on October 18.

B. Discussion

1. The Respondent met its burden under *Wright Line*

On these facts, we find that the Respondent established that it would have discharged Miles and Verderber for refusing to take the polygraph, even had they not been involved in union activities.

The Respondent was attempting to determine responsibility for the loss of a bag containing $25,000 in cash. The Respondent's use of polygraphs to investigate the loss followed the standard industry practice in such situations.

The Respondent's identification of Miles and Verderber (among others) for polygraphing was reasonable. Miles had signed for the missing $25,000 bag, and his signature was the last affirmative act attesting to possession of it. Further, Miles and Verderber worked on the truck that transported the missing bag immediately after Miles signed for it.

The Respondent's decision to discharge Miles and Verderber when they refused to take the polygraph was likewise reasonable. The Respondent was investigating the loss of $25,000. Miles and Verderber had access to the missing money. Miles and Verderber refused the Respondent's request to take a polygraph. Neither Miles nor Verderber gave the Respondent a reason for their refusal. Furthermore, there is no evidence that other Respondent employees had previously refused the Respondent's request to take a polygraph or that the Respondent had imposed lesser discipline for such refusal.

2. The judge's decision

The judge, in concluding that the discharges were unlawful, found that the Respondent's "investigation into the alleged loss [of the $25,000 bag] was a barely-concealed scheme by Carson to justify his unlawful terminations of Miles and Verderber" and that the "Respondent's demand that Miles and Verderber submit to polygraph examination was not the result of any legitimate investigation, . . . but was motivated solely by their activities in support of the Union." The judge identified several concerns underlying this decision.

First, the judge expressed doubt that the $25,000 was ever missing. Second, the judge expressed doubt that Miles' truck crew took possession of the bag the morning of June 27. Third, the judge found that Miles and his truck crew should have been "cleared of any suspicion" when Carson, in July, viewed a videotape of Miles' pay-in procedure at the vault the evening of June 27 and observed nothing suspicious on it. Fourth, the judge found that the Respondent did not adequately explain its delay from mid-July (when the customer reported the missing bag) until mid-October in requesting the polygraphs.

Fifth, the judge found that there were other employees who might have had access to the missing bag and that the Respondent should have polygraphed them in addition to the crew on Miles' truck and the three vault employees on duty the evening of June 27. Sixth, the judge found that the Respondent violated the Federal polygraph statute[8] by failing to provide the employees with certain written notices that the judge concluded were required by the statute.[9]

We find that the evidence does not support the judge's ultimate conclusion or her underlying concerns.

a. The judge's ultimate conclusion

The judge concluded, in effect, that the Respondent fabricated an elaborate plot—involving a customer's false report to the Respondent regarding a missing $25,000 bag, the Respondent's false report to an insurance broker regarding the missing $25,000, the Respondent's false report to a private investigator regarding the missing $25,000, and the unnecessary polygraphing of four employees regarding the missing $25,000—in the hope that two union supporters (Miles and Verderber) would refuse to take a polygraph thereby providing the Respondent with an opportunity to discharge them. However, the evidence does not support the judge's supposition.

First, the customer (whose $25,000 bag was lost) was a well-known restaurant. That customer, in a letter written on its letterhead, demanded that the Respondent reimburse it for the $25,000. That letter was introduced into evidence. The General Counsel failed to introduce any evidence—such as the testimony of a representative of the restaurant—that this letter was fabricated or that the restaurant had anything other than an arms'-length business relationship with the Respondent. Nor do we find any support for the judge's apparent speculation that the restaurant might have falsely reported the loss of $25,000 in order to assist the Respondent in a scheme to discharge two union supporters for refusing to take a polygraph.

Next, we note that the Respondent's actions in reporting the missing $25,000 to the insurance broker and to the private investigator involved at least some commercial risk to the Respondent. As the broker testified, even if the Respondent did not file a claim for the missing $25,000, the broker routinely passed reports of such incidents on to the insurance companies. The insurance companies, in turn, sometimes raise an armored car firm's insurance rates substantially or cancel the insurance entirely based on such reported losses. Similarly, there was at least a possibility that the broker or the investigator would spread news of the missing $25,000 to other persons, including the Respondent's customers or competitors, thereby damaging the Respondent's reputation in the armored car industry.

Nor is there evidence that the Respondent had any reason to anticipate that the union supporters would refuse to take a polygraph. To the contrary, the evidence establishes that the Respondent routinely used polygraphs during investigations and there is no evidence that any employee had previously refused to take a polygraph.

In short, we find it extremely unlikely that the Respondent would have exposed itself to significant commercial risks by: enlisting an established customer to falsely report the loss of $25,000, reporting that loss to the Respondent's insurance adjuster, and seeking the advice of a private investigator, all on the chance that two union supporters would refuse to take a polygraph regarding the $25,000.

In these circumstances, we reject the judge's ultimate conclusion—that the Respondent fabricated or seized upon the lost $25,000 bag as part of a scheme to discharge two union supporters for refusing a polygraph. We find instead, that the Respondent acted in good faith in requesting that the employees take the polygraph and acted lawfully in discharging the employees when they refused to do so. See *Houston Coca Cola Bottling Co.*, 256 NLRB 520, 527 (1981) (no inference of antiunion motive for employer's request that employees take polygraph where employer "could not have known which employees would refuse to take . . . the polygraph").

b. The judge's underlying concerns

We have likewise considered each of the judge's underlying concerns. We find that several are unsupported by the evidence. We further find that the concerns—considered individually or cumulatively—do not support the conclusion that the Respondent fabricated the investigation or the polygraph requests in order to discharge the two union supporters.

[8] The Employee Polygraph Protection Act, 29 U.S.C. § 2001, et seq. (1988).

[9] The judge found that the Respondent violated the statute by failing to give the employees (1) a written statement regarding the incident being investigated; (2) a written statement telling the employees that they had had access to the missing property; (3) a written statement regarding the Respondent's reasons for believing they might be involved in the disappearance of the property; (4) a written notice regarding the scheduled date, time, and location of the polygraph; (5) a written notice regarding their right to consult with counsel before the polygraph; (6) a written notice regarding how the test would be conducted; and (7) a written notice regarding their opportunity to review the test questions.

(1) Whether there was a missing $25,000 bag

The judge doubted that the $25,000 was ever missing. The judge based her doubt on the facts that the Respondent did not introduce into evidence its canceled check reimbursing the customer for the missing $25,000, that the Respondent did not file an insurance claim for the $25,000, and that the Respondent did not introduce into evidence all of its computerized records regarding the movement of the missing bag.

However, with regard to the basic question of whether the $25,000 was ever missing, Miles corroborated Carson's testimony that Carson asked Miles about the missing $25,000 in July. Miles and Verderber did not become involved in union activities until sometime after July. This fact—that Carson asked Miles about the missing $25,000 several weeks before Miles and Verderber became involved in union activities—is strong evidence that there was a missing $25,000.

Furthermore, as noted above, the record also contains a letter from the customer to the Respondent on the customer's letterhead demanding reimbursement for the $25,000. Moreover, Carson testified that the Respondent reimbursed the customer for the $25,000 and respondent official, Charles Strebeck, corroborated Carson's testimony, testifying that the Respondent sent the customer a check for the missing $25,000 on November 29. And, the General Counsel introduced no evidence—such as the testimony of an official of the customer—that the Respondent did not in fact pay the customer the $25,000.

With regard to the issue of the canceled check, the General Counsel did not subpoena the canceled check or otherwise put the Respondent on notice that it was questioning whether the Respondent had actually paid the customer the $25,000. Accordingly, we attach little weight to the fact that the Respondent did not introduce the canceled check into evidence.

With regard to the issue of the Respondent's failure to file an insurance claim for the $25,000, the record provides a rational explanation. The Respondent's insurance broker testified that filing a claim might have caused the Respondent's insurance premiums to increase substantially, and that insurance companies sometimes canceled the insurance of armored car firms because of such losses. The broker similarly testified that if one insurance company cancels a firm's insurance, it was likely that other companies would refuse to insure the firm. Under State regulations, an armored car firm could not do business if it did not have insurance. Furthermore, although Carson readily admitted during his testimony that the Respondent did not file an insurance claim regarding the $25,000 loss, the General Counsel did not ask Carson why the Respondent did not file a claim.

With regard to the issue of the Respondent's computerized records regarding the missing bag, it is unclear what additional records existed. The parties introduced Miles' computer-generated payout sheet, route sheet, and pay-in sheet for June 27. Although witnesses for both the Respondent and the General Counsel testified at length regarding these sheets as well as the Respondent's property-tracking procedures generally, the General Counsel did not subpoena or otherwise demand that the Respondent produce any additional records.

(2) Whether Miles' truck crew took possession of the bag

The judge expressed doubt that Miles' truck crew took possession of the bag on the morning of June 27. However, Miles admitted that the usual procedure during morning payout was for the vault clerk to call out each bag number, for the driver to circle that bag number on the payout sheet as the number was called out, and for the driver to then watch the clerk as the clerk placed the bag on a small wagon that the driver used to move the bags from the vault to the armored truck. Miles' payout sheet for the morning of June 27 was introduced into evidence. The sheet lists the number of the missing bag, the number is circled, and Miles' signature is on the sheet. Miles testified that he signed the sheet.

The judge noted that although the missing bag was listed on Miles' payout sheet, the bag was not listed on Miles' route sheet—a separate document showing the stops that Miles was scheduled to make and the items Miles was scheduled to deliver at each stop. The judge further noted that, on occasion, after the clerk called out a bag number and the driver circled the number on the payout sheet, the clerk inadvertently failed to put the bag in the wagon and the driver failed to notice the clerk's error.[10]

However, the critical issue here is not whether Miles and Verderber were guilty of stealing the missing bag. Rather, the critical issue here is whether the evidence so clearly exonerated Miles and Verderber from any responsibility for the missing bag as to render the Respondent's polygraph request irrational or suspicious. Given that the bag was missing and that Miles signed for the bag, these additional facts noted by the judge fall far short of clearly exonerating the employees.

[10] The judge also noted that the vault clerk did not sign Miles' payout sheet and asserts that this violated the Respondent's standard procedures. However, the evidence shows that it was common practice for the vault clerk to not sign a driver's payout sheet.

(3) The videotape of Miles' pay-in procedures

Carson admitted that he reviewed a security videotape showing Miles' pay-in procedures the evening of June 27 and that he found nothing suspicious on the videotape. This fact, however, did not exonerate Miles or his truck crew. Although the videotape showed Miles turning in property bags and receipts to the vault clerk during the pay-in procedures, the camera was too far away to show which bags or receipts were turned in. Thus, it was not possible to ascertain from watching the videotape whether the missing $25,000 bag was one of the bags Miles turned in to the clerk on June 27. As noted above, the issue here is whether the Respondent acted reasonably in requiring Miles and Verderber to take the polygraph, not whether Miles and Verderber stole the missing $25,000. The June 27 pay-in videotape could not conclusively exonerate them and it is therefore largely irrelevant to the issues before us.[11]

(4) The Respondent's delay in requesting the polygraphs

The customer notified the Respondent regarding the missing bag in mid-July. The Respondent requested that the six employees take the polygraphs in mid-October, about 2 weeks before the November 2 Board election. In rejecting the Respondent's explanation for the polygraph requests, the judge noted this delay and the timing of the polygraph requests relative to the election. However, we find that the evidence supports the Respondent's explanation for the delay and the timing of the polygraph requests.

With regard to the delay, the insurance broker corroborated Carson's testimony that it was common in the armored car industry for a property bag to be missing for several weeks and to then turn up. The broker further testified that the delay from mid-July to early October was "not that unusual." We also note Carson's uncontradicted testimony that, over a 1- to 2-month period, he repeatedly telephoned the banks where the Respondent made deliveries to ask if they had located the missing bag.[12] We also note Carson's uncontradicted testimony that Miles was an excellent employee whose paperwork was "impeccable" and that this was a reason Carson believed the missing bag would eventually be found, thereby further explaining Carson's delay in initiating a more formal investigation.

With regard to the timing of the polygraph requests, we note that Carson telephoned the insurance broker in early October to discuss the missing bag, that the broker strongly encouraged Carson—verbally and by letter—to take further steps to insure that the Respondent's employees were not criminally responsible for the disappearance of the missing bag, and that Carson immediately thereafter initiated the polygraph requests.

(5) The Respondent's failure to polygraph additional employees

The judge noted that the Respondent identified six employees for polygraphing. Miles and Verderber were among these six. The judge noted that additional employees—particularly employees who transported the bag on June 26 and vault employees who handled the bag the morning of June 27—had access to the missing bag. The judge suggested that the Respondent's failure to polygraph these additional employees undermined its explanation for requesting Miles and Verderber to take the polygraph. We disagree.

The June 27 payout sheet shows the number of the missing bag, the circle Miles drew around the missing bag number, and Miles' admitted signature attesting to receipt of the missing bag. This is strong evidence that the vault clerk gave the missing bag to Miles during payout on the morning of June 27. In these circumstances, the Respondent acted rationally in not polygraphing employees who had access to the bag before Miles signed for it and, instead, in requesting tests of the six employees who had access to the bag after Miles signed for it—that is, Miles' truck crew and the three employees who worked in the vault the evening of June 27. Accordingly, we draw no adverse inference from the Respondent's failure to polygraph employees who had access to the bag before Miles signed for it on June 27.

(6) The Federal polygraph statute

The judge found that the Respondent failed to comply with several written notice requirements of the Federal polygraph statute, which failure is a basis for rejecting the Respondent's explanation for the polygraph requests. Whether the Respondent violated the Federal polygraph statute is not a question before us, and we do not decide it. The Respondent's asserted failure to give the written

[11] The judge implicitly criticized Carson for allowing the June 27 pay-in videotape to be erased after Carson viewed the videotape. However, as Carson reasonably explained, the videotape showed nothing unusual and therefore there was no reason for Carson to deviate from the Respondent's usual procedure of re-recording over the videotape every 31 days.

[12] The judge noted Carson's testimony that he kept detailed records of the phone calls he made to the banks trying to locate the missing bag. The judge also noted that the Respondent did not introduce these records into evidence and drew an adverse inference from the Respondent's failure to do so. We disagree. At the hearing, the General Counsel did not fairly put the Respondent on notice that he was challenging Carson's testimony regarding his phone calls to the banks. For example, the General Counsel did not ask for specifics regarding the banks called or the persons with whom he spoke. Nor did the General Counsel subpoena the records or otherwise ask the Respondent to produce them.

notices required by the Federal statute has no bearing on the Respondent's explanation for the polygraph requests. The likelihood that the Respondent's reason for requesting the polygraphs was the missing $25,000 (rather than the employees' union activities) is the same whether the Respondent gave the written notices required by the Federal statute or failed to provide that notice. We accordingly reject the judge's apparent conclusion that the Respondent's arguable failure to comply with the Federal polygraph statute somehow discredits its explanation for the polygraph requests.[13]

In sum, based on all of the foregoing, we find that the Respondent has rebutted the General Counsel's prima facie case by establishing that it would have discharged employees Miles and Verderber regardless of their union activities. Accordingly, we dismiss the 8(a)(3) and (1) complaint allegations as to these employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Fernando Miranda.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner encompassed by the complaint.

THE REMEDY

Having found that the Respondent engaged in an unfair labor practice as described above, we shall order the Respondent to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Fernando Miranda, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[13] The General Counsel did not allege, the evidence does not show, and the judge did not find that the employees' refusal to take the polygraph was in any way attributable to the Respondent's arguable violations of the Federal polygraph statute. Accordingly, this is not a case where the employer is alleged to have violated the Act by discharging an employee for a concerted assertion of employee rights under some other State or Federal law. See, for example, *G.V.R., Inc.*, 201 NLRB 147 (1973).

ORDER

The National Labor Relations Board orders that the Respondent, American Armored Car, Ltd., Elmsford, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they support or engage in activities on behalf of the United Federation of Security Officers, Inc., or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Fernando Miranda full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Fernando Miranda whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from the files of Fernando Miranda any reference to his unlawful discharge and, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elmsford, New York facility and at its JFK facility in Queens, New York, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you support or engage in activities on behalf of the United Federation of Security Officers, Inc., or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to Fernando Miranda full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Fernando Miranda whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Fernando Miranda, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

AMERICAN ARMORED CAR, LTD.

Jaime Rucker, Esq., for the General Counsel.
James J. Cusack, Esq. and *James W. Cusack, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in New York, New York, on May 22, 23, and 24, 2001. The complaint, which issued on January 31, 2001, and which was amended on March 7, 2001, was based upon unfair labor practice charges filed on October 2, 18, and 25, 2000, by the United Federation of Security Officers, Inc. (the Union) against American Armored Car, Ltd. (Respondent).[1] It is alleged that on September 27 and October 17 and 19, Respondent terminated Fernando Miranda, Leonard Miles, and John Verderber, respectively, because of their support for and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act. For all of the reasons set forth, I find Respondent violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent denies the labor organization status of the Union. Ralph Purdy, president of the Union, testified the Union admits security and armored car guards to membership, and does not admit to membership employees other than guards. The Union exists for the purpose, in whole or in part, of dealing with employers concerning wages, benefits, and other terms and conditions of employment. I find, based upon this credible testimony, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the business of providing armored car and truck transportation of valuables, including currency, jewelry, and securities in the New York area. Respondent maintains a facility in Elmsford and one at Kennedy Airport (JFK). The Elmsford facility, which is the facility involved in this case, consists of two floors. On the first floor is a garage, which houses Respondent's vehicles. From within the garage there is access to the main employee area, a room that is approximately 20 by 12 feet. At one end of the room is a counter with four

[1] All dates are in 2000 unless otherwise indicated.

windows. Behind the counter is the vault, the money processing room, the coin room, and the cash room. Respondent's administrative offices are located on the second floor. The vault is in operation almost continually, from about 6 to 3 a.m. Respondent employs approximately 60 guards, couriers, and drivers at the facility. These employees have access to the garage and to the main employee area. Respondent also employs vault clerks and vault managers.

Video surveillance cameras are mounted outside the building at every entrance to the facility, inside the garage, inside the main employee area and throughout the vault area. Monitors located within the facility allow for simultaneous viewing from all camera angles. There is also a taping system and tapes are routinely maintained for 30 days.

James Carson is Respondent's director of security and an admitted supervisor and agent. Pete Lysohir was the dispatcher at the Elmsford facility at the time of the events of this case. He was responsible for setting up truck routes, assigning drivers, and making sure pickups and deliveries were made. He also handled all employee requests for time off. William Castro is the a.m. vault manager and Hector Benitez is the p.m. vault manager. Both have the authority to dispatch crews to additional pickups and deliveries. Benitez also has the authority to call employees in to work. In a pretrial affidavit Benitez stated: "I am the ranking member of management responsible for the operation of the vault and the procedures there in [sic] during the evening hours when the truck crews check in there [sic] cargo. As a member of management I request to be represented by an attorney for the company during any interview by the NLRB."

In early October, Mark Casellas was promoted from a driver position to a route supervisor. After his promotion, Casellas continued to drive a regular route and, according to Verderber, there was no change in his duties.

B. Respondent's Request for Leave Procedures

Lysohir was the person to whom employees submitted leave requests. He testified he made the decision to grant or deny leave requests based upon business need, defined as the number of employees needed to perform work on any given day. It is Respondent's general practice to dispatch three-person crews on each vehicle although, on many occasions, Respondent relies on two-person crews. Respondent never dispatches a vehicle with only one employee. According to Lysohir, an employee requesting time off had to submit a written form, and employees never made an oral request for leave without following up with a written request.

Miranda testified that in the course of his employment, from July 1998 up until the time of his discharge on September 27, 2000, he submitted approximately 20 leave requests to Lysohir, all of which were granted. Miranda usually spoke to Lysohir directly, either face-to-face or via two-way radio. If Miranda knew ahead of time that he needed time off, he submitted a written request form to the vault clerk with instructions to give it to Lysohir.

Miles testified that in the course of his employment, from July 1998 up until the time of his discharge on October 17, he submitted approximately 10 leave requests to Lysohir, all of which were granted. On some occasions he spoke with Lysohir via two-way radio, and on other occasions, he submitted the written form.

Verderber testified that in the course of his employment, from January 10 up until the time of his discharge on October 18,[2] he submitted three leave requests, all of which were approved by Lysohir.

Mei testified that in the course of his employment, from July 1998 up until the time of the hearing, he submitted between four and seven leave requests to Lysohir, all of which were approved. If the request was made on short notice, he spoke with Lysohir either face-to-face or via the two-way radio. If the request was made well in advance of the requested time off, he submitted the written form.

C. Respondent's Payout and Pay-in Procedures

Respondent has two tracking systems for property in its possession. The first system is based on paper receipts. Valuables and currency are placed in numbered bags and every bag is accompanied by a three-ply receipt, which is either rubber-banded to the bag or slipped into a plastic pocket attached to the bag. When a bag is picked up from a customer, the customer fills out the top portion of the three-ply receipt and enters the bag number and the value of the property. The courier enters the time he arrived, the time he departed, the route number, the date, and his signature. The courier gives the pink copy of the receipt to the customer and leaves the customer's premises with the bag and with the white and yellow copies of the receipt. If the bag is delivered either to another customer, or to a bank for deposit, the courier enters the date, time, and route number and the receiver of the property signs the receipt. The courier leaves the yellow copy of the receipt with the receiver of the property and retains the white copy. At the end of his shift, the courier turns the white copy over to the vault clerk. If the bag is not delivered to another customer or to a bank, it is returned to the vault clerk at the end of the shift with the yellow and white copies of the receipt. A white receipt, signed by a receiver of property, is called a "dead" receipt or "dead" work. A yellow and white receipt, attached to a property bag, is called a "live" receipt or "live" work.

The second system for tracking property in Respondent's possession is a computerized database. Every evening, two sheets are generated from this database. The first is a payout sheet which contains a listing of customers to whom property is to be delivered, those customers' addresses, the value of the property to be delivered to each customer and the seal number of each property bag. The second is a route sheet that lists all customers to be visited by a truck crew, including pickups and deliveries, and the order in which those stops are to be made. These sheets are used by the vault clerks each morning to sort the property bags given to each truck crew. One member of each crew receives both sheets and stands at the counter window while the vault clerk calls out the customer name, the value of the property in each bag, and the seal number of each bag. The courier marks off the corresponding entries on the

[2] Although the complaint alleges Verderber was terminated on October 19, Verderber testified he was terminated on October 18.

payout sheet, and places his signature at the bottom. The vault clerk then drops the property bag into a basket at his feet, inside the vault. When the procedure is completed, the vault clerk wheels the basket through a door underneath the counter window and the courier takes possession of the basket with the bags.

Miles and Verderber testified the couriers do not recheck the seal numbers on the bags after the basket is wheeled out to them. Nor do they necessarily cross check the customers listed on the payout sheet with the customers listed on the route sheet, and errors in the payout procedure sometimes occur. Verderber testified sometimes a bag listed on the payout sheet for one truck crew may in fact have gone out with a different truck crew. It also occurs that a courier will sign for a bag during the payout procedure even though the bag is not yet physically located within the Elmsford facility. A transfer truck brings the bag later in the day and it is redistributed to waiting crews. One week before Verderber's termination, he went through the payout procedure with vault clerk Kenny Rubero. As Verderber was loading his truck, Rubero came out to him and handed him a property bag. Verderber asked if he had signed for the bag, and when Rubero said yes, Verderber asked how it was that the bag didn't make it into the basket. Rubero's response was that he must have been distracted.

At the end of the shift, the courier returns all property bags, with their accompanying receipts, to the vault clerk. The vault clerk takes physical possession of each bag, one by one, and either scans the receipt into the computer or manually enters the number of the receipt into the computer. The courier also returns the white copies or "dead" receipts, and the vault clerk again either scans the receipt into the computer or manually enters the information. There is a space for the vault clerk's initials next to every item on the route sheet. If an item is not returned, the computer flags the item, and the vault clerk must call security. If all items are accounted for, the vault clerk clears the crew. Only when the vault clerk is satisfied that there has been a complete accounting does he allow the crew to leave.

D. The Organizing Effort

From May to August, Miranda spoke to employees about the Union on a daily basis. These conversations took place in the employee parking lot, located about a half-block from the facility, and at One Chase Manhattan Plaza in Manhattan where employees from both the Elmsford and JFK facilities congregate each day after making pickups and deliveries. On or about September 1, Purdy gave Miranda authorization cards and Miranda began distributing the cards on September 6. He distributed cards at One Chase Manhattan Plaza and in the employee parking lot after work. Together with Miles, he distributed approximately 40 cards, all of which were signed.

Beginning in mid-August, Verderber began soliciting employee signatures on authorization cards. He did this in the main employee area in the mornings when employees were waiting for their work assignments. He also did this in the garage area, at One Chase Manhattan Plaza, in an area across the street from the Elmsford facility and in the employee parking lot. He printed flyers on his home computer and, in the 3 weeks prior to the November 2 election, distributed them to employees. He placed flyers on the counter, in the employee bathroom and on the soda machine in the main employee area.

Beginning in early September, Miles began speaking with employees and distributing authorization cards in the main employee area, in the employee parking lot, in front of the Elmsford facility and at One Chase Manhattan Plaza. Miles distributed between 40 and 50 cards. Beginning in the second week of September, and continuing on a daily basis up until the time of his discharge, Miles distributed union literature in the garage, in the main employee area and at One Chase Manhattan Plaza.

On September 22, the Union filed a petition in Case 2–RC–22286. Daisy Cabrera, secretary to the assistant Regional Director for Region 2, testified that same day she mailed by certified mail, no receipt requested, a copy of the petition with related documents to Respondent. The documents were addressed to Dominic Colasuonno, Respondent's president. Also on that same day, shortly after 4 p.m., Cabrera called Respondent's office at the number listed on the petition and asked the person who answered the phone for the Company's fax number. Starting at 4:22 p.m., Cabrera faxed a copy of the petition and related documents to the fax number given to her over the phone. The transmission was completed at 4:34 p.m. It is not disputed that the fax was sent to Respondent's administrative offices and to the correct fax number. Carson testified, however, that the hours of operation of the administrative offices are 8 a.m. to 4 p.m. and that to his knowledge, no one in Respondent's offices saw the petition on September 22.

Verderber testified that on one occasion he overheard Dominic Colasuonno, Respondent's president, talking to employees inside the vault area. He heard Colasuonno say that he wasn't worried about the Union because it would never come into his company. Verderber could not recall the date Colasuonno made this statement.

The election was conducted on November 2. Verderber testified that 2 to 3 weeks prior to the election, Colasuonno authored a letter that was distributed with employees' paychecks. The letter, which was not introduced in evidence, stated that employees' ability to support their families might be in jeopardy if the Union came in and that the Union could not give employees anything that Colasuonno did not agree to. At about the same time this letter was circulated, Mark Casellas and another route supervisor by the name of Bert, told Verderber there had been a meeting at which "a list of employees' names was out, and they were just basically going down the list, seeing who they thought was for the Union and who they thought was against it." On another occasion, Bert told Verderber to think about the way he wanted to vote because if the Union came in hours would be cut. Neither Casellas nor Bert testified.

E. The Discharge of Miranda

1. Miranda's version

On Thursday, September 21, Miranda went to see his doctor and was told he had a cyst that would most likely require immediate surgery. While Miranda was still in the office, the doctor scheduled an appointment for Miranda to see a surgeon the following Tuesday, September 26, and he also tentatively

scheduled the surgery for September 29. When Miranda returned to work on September 22, Miranda submitted a written request to be off on September 26.

Early on the morning of Monday, September 25, Miranda tried to reach Lysohir on the two-way radio to speak to him about his leave request for the next day, but was unsuccessful in contacting him. Sometime between 8 and 9 a.m. that same morning, a vault clerk contacted Miranda and told him there was an envelope waiting for him. Miranda could not recall which vault clerk gave him this message. While still on his route, at around 4 p.m., Miranda reached Lysohir by radio and told him the reason he needed the next day off. Miranda also told him that depending on what the surgeon said, he would probably need September 29 off as well. According to Miranda, Lysohir told him it was not a problem and that he could take September 26 off. Lysohir did not testify about this conversation with Miranda.

Miranda returned to the Elmsford facility at the end of his shift at around 8:30 p.m. He retrieved the envelope that was waiting for him, and inside the envelope was a copy of his written leave request. The request was marked "denied" and signed by Lysohir. According to Miranda, this was the first time any leave request he had ever submitted had been denied. When Miranda inquired of the vault clerk, he was told that the envelope had been there since about 8 a.m. Miranda asked if either Lysohir or Carson were in and he was told they had both left for the day. Miranda testified that since he had spoken with Lysohir at 4 p.m., 7 or 8 hours after the envelope had been left with the vault clerk, he assumed that Lysohir's oral approval superseded the written denial.

On September 26, Miranda went to see the surgeon and did not report for work. According to Miranda, he called Lysohir later in the day to find out what time he was scheduled to work on September 27. Lysohir gave him the time to report the next day, but also told him that Carson wanted to speak with him.

Lysohir testified he reviewed Miranda's leave request on Monday, September 25 and marked the slip denied. He did not speak to anyone before he denied the request. Lysohir further testified when he arrived at work on Tuesday, September 26, Carson told him that Miranda was a no-show, no-call and asked why Miranda was not at work. Lysohir told him he didn't know, Miranda had not provided him with a reason. Carson denied having this conversation with Lysohir.

Miranda testified that on the morning of Wednesday, September 27, Carson called him at his home and asked him why he had been a no-show, no-call the day before. Miranda explained that Lysohir had approved his request for the day off. Carson told him he was fired and hung up. Several minutes later, Carson called back and asked Miranda to explain to him in detail what had happened. Miranda again explained that Lysohir had approved the day off. Carson became loud and said guys like Miranda thought they could run the company and take days off whenever they wanted, but that Miranda was not allowed to do whatever he wanted. Carson said he was the boss and he ran the Company. He told Miranda to bring in his identification and uniform and to pick up his last check.

On Thursday, September 28, Miranda saw Benitez on the Grand Concourse in the Bronx. According to Miranda, Benitez told him he had overheard Carson speaking with Miranda on the phone the day before. After Carson hung up the phone, he said, in Benitez' presence, that he had just finished killing the head and now he would kill the body, he had one more to go. Benitez, who was still employed by Respondent at the time of the hearing, denied making this statement to Miranda. Carson also denied ever making such a statement.

Miles testified to a similar statement made to him by Benitez. According to Miles, one evening when Benitez was checking him in at the end of his shift, Benitez told him he had witnessed Carson on the phone with Miranda. When Carson hung up, he said, "good, that's one Union organizer down, now we have to get Miles." Benitez did not testify regarding this conversation with Miles, and Carson denied making the statement.

2. Carson's version

According to Carson, on Monday, September 25, Lysohir told him that Miranda had requested September 26 off and that he was going to deny the request because of low manpower. Carson told Lysohir to tell Miranda over the two-way radio that his request was denied, and also to put the denial in writing.

On direct examination, Carson testified that he reviewed Miranda's personnel file prior to making the decision to terminate him. On cross-examination, Carson became confused on this point, testifying to the following sequence of events which he recalled occurred on September 26:

> A. I came into work approximately, I'd say 7:30.
>
> Q. Did you speak to anyone about Miranda that morning before you spoke to Miranda?
>
> A. Yes. I don't remember who, it was somebody in the vault, and I just—I was in the vault and I waited to see Mr. Miranda came in . . . I was just questioning if Miranda came in here, and he didn't come in yet.
>
> Q. Did you speak to people before you called Miranda?
>
> A. No.
>
> Q. So, you did not ask Lysohir why Miranda was absent?
>
> A. Lysohir was not there.[3]
>
> Q. Did you go upstairs then right after that?
>
> A. No.
>
> Q. When did you call Miranda?
>
> A. Approximately, probably about 8:30 in the morning.
>
> Q. Between the time you came into work at 7:30 and the time you called Miranda, did you go upstairs?
>
> A. No, I didn't.
>
> Q. You testified that you reviewed Miranda's personnel file prior to calling Miranda, right?
>
> A. No, I didn't.
>
> Q. You did not testify that you reviewed Miranda's file prior to deciding to terminate him?
>
> A. No, I—yes, you are right, that is correct. Prior to calling him, yes I did.

[3] Both Lysohir and Carson testified that at the time of these events, Lysohir did not report for work each day until 10 a.m.

Q. And where are the personnel files?
A. Right in my office.
Q. Where is your office?
A. One flight above the vault.
Q. That is upstairs, correct?
A. That is correct.

Carson testified he called Miranda at 8:30 a.m. and asked him why he had not shown up for work. Miranda responded by asking the question, "[W]hy doesn't this place have personal days?" Carson told Miranda that was not the answer he was looking for at which point Miranda cursed at him and hung up. In a memorandum prepared by Carson at 9:30 a.m. on the morning of September 26, he wrote, "I instructed Mr. Miranda to return his uniform and ID on 9/28/00 and on that day he will receive his paycheck." Carson made no reference in that memorandum of having reviewed Miranda's personnel file prior to making the determination to terminate him. Carson denied having any knowledge of the fact that a petition had been filed when he made the decision to terminate Miranda.

Carson testified he was unaware of the medical reasons underlying Miranda's request for the day off and that Miranda never mentioned these reasons during the September 26 phone conversation. Benitez, on the other hand, testified that Carson told him that Miranda had taken 2 days off, not 1 day, and that Miranda had claimed he was ill.

Respondent's standard operating procedures manual provides that if an employee is ill, he must call dispatch at least one hour prior to his start time. He must also call by 4 p.m. that same day to inform dispatch of his intentions for the following day.

3. Previous misconduct by Miranda

Miranda had three written warnings in his personnel file. On October 29, 1998, he and two other crew members were given a written warning for leaving a bulkhead door unsecured. On December 15, 1998, he was suspended for 5 days for leaving a truck unattended, and on June 8, 1999, he was given a written warning for failing to report to work or to call in.

4. Other employee misconduct

The General Counsel introduced 94 incident reports involving 35 employees. Four incidents of insubordination are documented. In July 1998, Donell Holman failed to attend a mandatory employee meeting after having received three notices advising him that he must attend and was given a 2-day suspension. In June 1999, Mauricio Vilches was terminated for having reported for weekend work only 50 percent of the time over a 2-month period. In February 2001, Larry Cohen refused to follow instructions and no disciplinary action was taken other than a writeup. In April 2001, Jeffrey King refused to follow instructions and Benitez recommended that he receive a 1-day suspension. Of the 94 incident reports, this was the only one signed by Benitez.

There were numerous instances of employees failing to report to work and failing to call.

Prior to September 26, two employees (Polk and Connelly) were terminated in May for being no call/no show in 3 consecutive weeks. Two employees (Guzetta and Baron) received no discipline other than being written up. Another employee (Tucker) was sent home after the second time he was a no call/no show. After September 26, five employees (Bovan, Duncan, Dunston, Monegro, and Noble) were no call/no show (one of them for 2 consecutive days) and no disciplinary action was taken other than a writeup. Two employees (Perez and Lane) were suspended for one day. In 1998, Henry Tucker had two no shows/no calls, three latenesses, two unauthorized absences and a positive drug test. He was suspended after the drug test.

Of the 14 incident reports prepared by Lysohir, 10 were for latenesses, 1 for a no call/no show, 1 for an unauthorized sick day and 1 for an improper safety procedure. In none of these reports did Lysohir recommend disciplinary action be taken.

F. The Discharges of Miles and Verderber

1. The missing property bag

On June 26, a courier named Bradshaw picked up bag #G006353, containing over $25,000, from Lundy's Restaurant. At the end of his shift, Bradshaw turned the bag over to vault personnel at the JFK facility. Robert Peterson, a vault clerk, received the bag and gave it to a shuttle truck operator who transferred it to the Elmsford facility. Carson testified he did not know the names of the transporting employees and that there are no records documenting the transfer of the bag between the two facilities. He did acknowledge that the transfer might be reflected in the Company's computerized database.

On the morning of June 27, Miles signed for bag #G006353. The bag was listed on Miles' payout sheet and was to be deposited at Chase Bank at 55 Water Street in Manhattan. The bag was not, however, listed on Miles' route sheet. Miles could not recall the vault clerk who checked him out that morning, and the space for the vault clerk's signature on the payout sheet was left blank.[4] Miles worked that day with two other crew members, Verderber and Garafolo. At the end of the shift, Miles went through the pay-in procedures without incident and the crew was cleared to leave by the vault clerk.

Carson testified that in mid-July, he was contacted by a representative of Lundy's who advised him that the $25,000 was never deposited at Chase Bank. Together with Castro, Carson went to the vault area and conducted a search which Carson described as follows:

> On going through all the work, it took almost an hour, 45 minutes to an hour, we found the receipt somewhere mixed in with the paperwork on the side—it wasn't in that box. Paperwork was everywhere, and I just happened to see the receipt, and I showed it to Mr. Castro, and I showed it to him and that it was the original receipt with the yellow attached to it, the yellow ply attached to it, and it didn't have a signature on the bottom. . . . And all the paperwork was on me and Mr. Castro going through it. I happened to find the receipt on the side, I don't know if it was in the box or not, but I happened to see it

[4] Respondent's standard operating procedures manual provides that the vault clerk is supposed to sign the payout sheet. Castro testified the failure of the vault clerk to sign the payout sheet is an irregularity.

there. It wasn't stapled to nothing. Usually everything is stapled.

Carson reviewed the surveillance videotape for June 27. He observed the payout process at the beginning of the shift and saw Miles sign the payout sheet and hand it to the clerk. He also reviewed the pay-in procedures at the end of the shift. He observed Miles and Verderber put 10 to 11 bags on the counter, saw Miles hand the dead receipts to the vault clerk, and saw the vault clerk check the bags in. He also saw the vault clerk give Miles, Verderber, and Garafolo clearance to punch out and leave. Carson did not observe anything out of the ordinary in either the payout or pay-in procedures that day and he did not preserve the videotape.

Carson testified he called every bank that every truck crew went to on June 27. He called each bank two or three times over a period of 3 months and documented the times and dates of every call and the name of the person to whom he spoke. He further testified that Miles was an excellent employee whose paperwork was impeccable, and he thought that eventually the bag would show up.

In October, Carson contacted Antonio Palmiotto, an insurance broker and informed him of the loss. Palmiotto testified they spoke only briefly and Respondent never submitted a claim for the loss.[5] Palmiotto further testified that in these circumstances a claim would normally have been filed and he could not explain Respondent's failure to do so. He did testify that it is not unusual for there to be a delay in reporting a loss and for a parcel to be missing for a week or two or even longer and then show up somewhere.

2. The request for polygraph examinations

In October, Carson contacted a polygrapher, Ed Torian. Torian told him that whoever had access to the missing bag should be polygraphed. Carson identified six persons who had such access: the three employees on the truck, Miles, Garafolo, and Verderber, and the three employees who worked in the vault on the evening of June 27, Benitez, Cortes, and Castro. He did not include the two vault clerks who worked on the morning of June 27, Ernest Muscarella and Kenny Rubero. Nor did he include Bradshaw's crew, the shuttle truck crew, or any of the employees, supervisors, and managers who had access to the vault in the period between June 27 and mid-July when Lundy's reported the missing deposit. Benitez, Castro, Cortes, and Garafolo agreed to take the test and were released from suspicion.

On the evening of October 16, Carson and Verderber spoke twice by telephone. Carson asked Verderber to come to the Elmsford facility and submit to a polygraph examination. Verderber stated he had been drinking a little and did not want to drive.

[5] Respondent's employees are not bonded. Therefore, the only reimbursement mechanism for a loss is Respondent's insurance policy with Palmiotto. As of the time of the hearing, Respondent had not filed an insurance claim for the lost money, even though Carson and Charles Strebeck testified that Lundy's was reimbursed the $25,000. Nor had Respondent filed a police report or commenced civil proceedings against anyone for the loss.

On October 17, Miles returned to the Elmsford facility around 8 p.m. Miles testified that Carson called to him from the vault area and said he wanted Miles and Garafolo to take a polygraph. Miles asked what for and Carson said that a bag was missing off of Miles' truck. Miles asked when the bag was first missing because he had not heard anything about it, and Carson said the bag had been missing since June. Miles said he was not going to take a polygraph and Carson told him to step inside the coin room. Both men entered the coin room where they continued to argue. Miles asked to be shown the videotape for the day in question and Carson refused. Miles said he would not take a polygraph examination without first speaking with his attorney. Carson told him he was terminated, to turn in his ID and uniforms and to go home. According to Carson, after Miles refused to take a polygraph in the absence of his attorney, Carson told Miles he could have an attorney present, but Miles still refused. Carson testified he suspended Miles for refusing to take the polygraph exam but did not terminate him.

On October 18, Verderber returned to the Elmsford facility around 8 p.m. and was told Carson had already left. Verderber spoke to Carson by phone and told him he was not going to submit to a polygraph. According to Verderber, Carson stated, "[I]f you don't take the test, I can't let you put food on the table anymore. I'm going to have to take your ID back." According to Carson, he told Verderber that he was suspended for failing to cooperate with the investigation.

IV. ANALYSIS

A. Supervisory Issues

Respondent denies that Lysohir, Castro, Benitez, and Casellas are supervisors within the meaning of the Act. Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia are listed in the disjunctive; the possession of any one of them is sufficient to establish an individual as a supervisor. The exercise of any such authority, however, must involve the use of independent judgement. The burden of proving supervisory status is on the party alleging that such status exists. *Webco Industries*, 334 NLRB 608, 609 (2001).

Lysohir testified that he set up truck routes, assigned drivers and couriers to those routes, made sure pickups and deliveries were made, and approved requests for time off. There is no evidence from which to conclude whether or not Lysohir exercised independent judgment in performing these tasks. Nor is there sufficient evidence to determine what, if any, disciplinary authority Lysohir possessed or exercised. In the 14 incident reports prepared by Lysohir, he did not recommend disciplinary action in any of them, and there is no evidence that disciplinary action was taken as a result of Lysohir's reports. With respect to employee requests for time off, the sole criteria Lysohir used

was manpower needs. Lysohir's job was to make sure there were at least two, and preferably three employees, on each truck. It does not require independent judgment to perform such a simple calculation. I find the General Counsel, who has the burden of proof, has failed to adduce sufficient evidence to establish Lysohir was a supervisor within the meaning of Section 2(11).

With respect to Castro and Benitez, the evidence of their supervisory status is equally sparse. Both had the authority to direct truck crews to additional pickups and deliveries. It is not clear, however, if they exercised independent judgment in making these assignments or if it was a routine exercise, i.e., directing the crew nearest to the location to make the pickup or delivery. It is also not clear if Castro and Benitez made these assignments independently or if they were conveying directions given by a higher management authority. Benitez prepared only one of the 94 incident reports introduced in evidence, and in that report he recommended the employee receive a 1-day suspension. Castro completed 11 incident reports and in only one report did he recommend that an employee be suspended. There is no evidence that either recommendation was followed. The fact that Benitez characterized himself as the highest ranking member of management in the evening hours does not, without more, confer supervisory status. *Training School at Vineland*, 332 NLRB 1412 (2000). I find the General Counsel has failed to adduce sufficient evidence to conclude that either Castro or Benitez is a supervisor within the meaning of Section 2(11).

With respect to Casellas, there is no evidence that as a route supervisor he possessed any of the statutory indicia of supervisory status. That he attended a meeting at which "they," presumably members of management, discussed employee interest in the Union does not attest to his supervisory status. Moreover, Verderber testified that after Casella's promotion, Casellas continued to drive a truck and Verderber did not observe any change in his duties. I find the evidence fails to establish that Casellas is a supervisor within the meaning of Section 2(11).

B. Agency Issues

With respect to Lysohir, Castro, and Benitez, Respondent admits they were agents of Respondent at all times material to this case. The issue is whether Benitez was an agent of Respondent for the purpose of communicating to employees Carson's statement that he had fired one union supporter and had one more to go.

The Board applies common law principles of agency when it examines whether an employee is an agent of an employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. The test is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. Thus, it is well settled that an employer may have an employee's statement attributed to it if the employee is held out as a conduit for transmitting information from management to other employees. *Cooper Hand Tools*, 328 NLRB 145 (1999).

In applying these principles here, I find the General Counsel, who bears the burden of proof, has failed to establish that Benitez was an agent of Respondent for the purpose of advising Miles and Miranda of the reason for their terminations. Benitez was not involved in hiring or firing decisions and his involvement in employee discipline was an isolated event. Benitez did convey messages from Lysohir regarding employee requests for time off, but there is no evidence that he was charged with communicating with employees about any other type of employment decision. I am aware of the uncontradicted testimony that Benitez was the highest ranking member of management working in the vault in the evenings, but I do not think that this fact, without more, establishes Benitez as an agent of Respondent for the specific purpose of communicating to employees the reason for their discharge.

For the same reasons, I find that there is no evidence to support a finding of agency with respect to Casellas when he advised Verderber that he had attended a meeting at which members of management had been discussing employee support for the Union. Casellas possessed neither actual nor apparent authority to make that statement on Respondent's behalf.

In view of these findings, I do not rely on the statements made by Benitez or by Casellas in resolving the issue of whether the discharges of Miles, Miranda, and Verderber were unlawful.

C. Credibility

I found the testimony of Carson untrustworthy and unreliable. With respect to the discharge of Miranda, his testimony conflicted in several material ways with the testimony of Lysohir, Respondent's admitted agent, and with Benitez, Respondent's witness. First, Lysohir testified that he did not speak to anyone on September 25 prior to making the determination to deny Miranda's request for the next day off. Carson, on the other hand, testified that Lysohir did talk to him on September 25 about Miranda's request for the next day off and that Carson instructed Lysohir to tell Miranda that his request was denied. Second, Lysohir testified that when he arrived at work on September 26 at 10 a.m., Carson asked Lysohir why Miranda was a no show, no call, and Lysohir said he did not know. Carson, on the other hand, denied ever having had this conversation with Lysohir and testified that he had already terminated Miranda by 8:30 a.m., before Lysohir came into work. Third, Carson testified that during his phone conversation with Miranda, Miranda had not offered a medical excuse. Benitez, on the other hand, testified that Carson told him Miranda had said he was ill.

Carson's testimony was also self-contradictory. On direct examination, Carson testified that he had reviewed Miranda's personnel file prior to making the determination to terminate him. On cross-examination, however, Carson testified that he came into work on September 26 at 7:30 a.m., and that between 7:30 and 8:30 a.m. when he spoke to Miranda on the phone, he did not go into his office where Miranda's personnel file was located.

I found Carson's testimony regarding the discharges of Miles and Verderber similarly untruthful. Carson testified to a meticulous dual system of record keeping in Respondent's vaults. One would expect no less from an armored car company charged with the safekeeping of large sums of money and valuables. Yet when it was allegedly reported to Carson that a bag containing over $25,000 was missing, Carson testified that he entered the vault and saw paperwork everywhere, and the receipt in question strewn to one side. Carson did not reprimand Castro, the vault manger on duty, or anyone else for the state of disarray that, if true, would have constituted a serious lapse in security.

Carson testified he called every bank his employees had contact with and that he kept a record of every call. No such document was introduced. Carson viewed the video surveillance tape for June 27, and fully aware that the tape was a key piece of evidence in the alleged loss, allowed the tape to be erased. Carson testified that Lundy's was reimbursed for the missing $25,000 deposit, but no canceled check was introduced and no insurance claim was ever filed.

I found Miranda, Miles, and Verderber to be far more credible witnesses. Miranda was not always articulate and acknowledged having a limited formal education. He appeared to me to be incapable of manipulating the facts to his advantage. Verderber testified in a straightforward manner and was equally responsive on direct and cross-examination. Miles was the most articulate and perceptive of the three, and it was readily apparent why Respondent considered him to be a outstanding employee. He had an excellent recall of events and his testimony was consistent with the balance of the credible evidence. In short, I found all three witnesses to be more believable than Carson.

Lysohir was still employed by Respondent at the time of the hearing and he was overly cautious during his testimony. He appeared to be calibrating his responses, attempting to be truthful while at the same time trying not to give testimony damaging to his employer. I credit Lysohir only to the extent indicated.

D. Respondent's Knowledge of Union Activities

A prerequisite to establishing that Miranda, Miles, and Verderber were wrongfully discharged is finding that Respondent knew of their union activities. Knowledge need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. The Board has inferred knowledge based on such circumstantial evidence as the timing of the allegedly discriminatory action, an employer's general knowledge of union activities, animus, and disparate treatment. The Board additionally has relied on factors including the delay between the conduct cited by the Respondent as the basis for the discipline and the actual discharge, and, in the case of multiple discriminatees, that the discriminatees were simultaneously discharged. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996), and cases cited.

Respondent's general knowledge of its employees' union activities is established as of the morning of September 25. The petition was filed in the regional office on September 22 and faxed to Respondent's offices at around 4:30 p.m. that same day. Carson's testimony that the office was closed at 4:30 p.m. is highly suspect, given the fact that only minutes before, someone answered the phone and responded to the Board's representative request for a fax number. Nevertheless, accepting Respondent's position that the office was closed at the time of the fax transmission on September 22, it is clear that the office reopened on September 25 at 8 a.m. Respondent does not dispute that it maintains its fax machine as a regular means of communication, and that the petition was faxed to the correct number. The evidence therefore establishes that the petition was received in Respondent's office on the morning of September 25. The demonstrated receipt of the faxed petition by Respondent's machine creates the presumption that Carson was aware of the petition that same day, and I discredit Carson's vague testimony that he was unaware of the petition until some later unspecified time. I find Carson's knowledge of the petition is established as of the morning of September 25. *B&C Contracting Co.*, 334 NLRB 218, 219–220 (2001).

Further evidence of Respondent's general knowledge of its employees' union activities is found in the credible and unrebutted testimony of Verderber. Verderber testified he overheard Colasuonno telling employees that he wasn't worried about the Union because it would never come into his Company. Although Verderber did not recall the date this statement was made, it clearly was made prior to Verderber's discharge on October 18. Verderber further testified, without contradiction, that Colasuonno wrote a letter to employees in mid-October stating that employees' ability to support their families might be in jeopardy of the Union came in. Not only does this memo evidence Respondent's knowledge of employees' union activities, it also demonstrates Respondent's animus toward those activities.[6]

Respondent had specific knowledge of the union activities of Miles and Verderber. The evidence shows that in August and September, Miles and Verderber distributed authorization cards and union literature in the main employee area and in the garage, both areas of the facility which were monitored by Respondent's security cameras. Carson testified that the video system allowed for both real time viewing and taped viewing. It is reasonable to infer that Respondent used the surveillance cameras for their designed purpose, i.e., to monitor the activities of its employees for security purposes. In doing so, I find Respondent acquired the knowledge of Miles and Verderber's union activities in August and September. *Montgomery Ward & Co.*, supra at 1254.

There is evidence that Respondent also had specific knowledge of Miranda's union activities. In the course of his phone conversation with Miranda on September 27, Carson made the statement that guys like Miranda thought they could run the company and take days off whenever they wanted. Carson said he was the boss and he ran the Company. The General Counsel argues that this statement shows knowledge of Miranda's union activities and I agree. Miranda had only one previous incident of taking an unauthorized day off, and that occurred in June

[6] Neither of these statements by Respondent's president is alleged as violating Sec. 8(a)(1) and I make no such finding. I do, however, rely on these statements as evidence of knowledge and animus.

1999, more than a year prior to this conversation. The only association Miranda had with other employees at the time of his discharge was his participation in union activities with Miles and Verderber. Carson's statement evidences his awareness of that association.

The timing of the three discharges, all occurring between the filing of the petition and the election, is further evidence of Respondent's knowledge of Miranda, Miles and Verderber's union activities. Miranda was terminated on September 27, 2 days after Respondent's receipt of the petition. Miles and Verderber were terminated 3 weeks later for refusing to cooperate in the investigation of a loss that had allegedly occurred four months before.

E. Wright Line Analysis

In all cases alleging a violation of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation, the General Counsel is required, in the first instance, to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the employer has the burden to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel has made out a prima facie case.

It is Respondent's position that Miranda was terminated for insubordination arising out of his failure to report to work on September 26. It is true that Miranda was given a copy of his written request marked denied. It is also true, based on the credible testimony of Miranda, that Lysohir told him, in a radio communication, that he could have the day off. Four employees testified that in the course of their employment, they had submitted 37 requests for leave, some oral, some written, and all granted by Lysohir. Given this circumstance, it was entirely reasonable for Miranda to assume that Lysohir's oral approval, given at 4 p.m., superseded his written denial that had been delivered to the vault clerk hours before. I credit Miranda's testimony that he called in to work on the afternoon of September 26, as required by Respondent's standard operating procedures manual, and was told by Lysohir to report for work the next day. I further credit his testimony that Carson called him on the morning of September 27, not September 26 as testified to by Carson, and told him he was terminated.

Assuming Miranda had been given unequivocal notice that his request for the day off was denied, which assumption is not warranted by the credible evidence, I would nevertheless conclude that Miranda was treated disparately from other employees. The only other employee previously terminated for insubordination was Mauricio Vilches who failed to report to work four weekends in a 2-month period. Two employees were terminated for no shows, no calls, but only after they had each done so in 3 consecutive weeks. As previously noted, Miranda's prior single incident of no show, no call occurred more than a year before his termination.

Carson's attention to Miranda's attendance is clear evidence of disparate treatment. Prior to September 25, Carson had never involved himself in requests for time off. Lysohir made those determinations and it was a routine exercise. Carson's admitted involvement in the decision whether to grant Miranda's request and his waiting in the vault area on the morning of September 26 to see if Miranda came in, suggest that Carson had orchestrated events for the purpose of putting Miranda in a situation where it could later be argued that he was insubordinate.

For these reasons, I find Respondent has failed to demonstrate that it would have discharged Miranda in the absence of his union activities. I further find his discharge violated Section 8(a)(1) and (3) of the Act.

It is Respondent's position that Miles and Verderber were suspended for refusing to cooperate in the investigation into the disappearance of bag #G006353. Contrary to this position, I find the investigation into the alleged loss was a barely-concealed scheme by Carson to justify his unlawful terminations of Miles and Verderber. In the first instance, it is not at all clear that the money did, in fact, disappear. There is no canceled check proving Respondent reimbursed Lundy's for the loss and Respondent never filed an insurance claim, a fact which Respondent's own insurance agent found odd. Even more significant, Respondent has in its possession computerized records which would show every movement of bag #G006353 and when it was last accounted for. Respondent chose not to introduce that evidence.

Nor is it clear that Miles and his crew ever took possession of the bag on the morning of June 27. There was a discrepancy in Respondent's computer generated reports. The bag was listed on Miles' payout sheet, but was not listed on his route sheet. It is entirely possible that the bag number was called out by the vault clerk, that Miles circled the bag number on his payout sheet, but that Miles never, in fact, received the bag. Because the bag was not listed on his route sheet, he would not have noticed the bag was missing as he proceeded on his route. The vault clerk did not sign the payout sheet, in violation of Respondent's standard operating procedures, and Respondent did not identify, nor call as a witness, the vault clerk on duty that morning. It is ironic that just 1 week prior to June 27, Verderber had experienced a similar situation. Vault clerk Kenny Rubero had called out a bag number and Verderber had checked off the number on his payout sheet. Rubero did not, however, put the bag in Verderber's basket, claiming he had become distracted.

Assuming Miles and his crew did take possession of the bag on the morning of June 27, they accounted for the bag when they cleared their route that evening. Carson's review of the videotape confirmed that Miles and his crew were cleared by the vault clerk, and a crew cannot be cleared until every item of property is accounted for. Assuming there ever was a time when the Lundy's bag was missing, Miles and Verderber were cleared of any suspicion when Carson reviewed the videotape in July. They remained free of suspicion until Carson resurrected the issue in the weeks before the election. Respondent contends that it took Carson 3 months, from mid-July to mid-October, to complete his phone survey of all the banks that might have had possession of the bag. Not only do I discredit Carson's testimony on this point, the investigatory log which Carson allegedly maintained was not introduced. I draw an

adverse inference from Respondent's failure to introduce that evidence. *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), enfd. 621 F.2d 328 (9th Cir. 1980).

Carson testified the standard used for determining who should be polygraphed in a loss situation is anyone who had access to the bag. Yet Carson excluded from the list of names given to Torian any number of employees who had access to bag # G006353 between June 27 and mid-July, most notable among them Muscarella and Rubero, the two vault clerks who worked on the morning of June 27.

Contrary to Respondent's argument at the hearing and in its brief, it did not comply with the requirements of the Employee Polygraph Protection Act (EPPA), 29 U.S.C. § 2001, et seq. (1988), when it insisted Miles and Verderber submit to polygraph examination. Respondent failed to provide Miles or Verderber with a written statement setting forth with particularity the incident being investigated, failed to give them a statement indicating that they had access to the property, and failed to give them a statement describing the basis of Respondent's reasonable suspicion that they were involved in the incident. 29 U.S.C. § 2006(d). Nor were they provided with written notice of the date, time, and location of the test, written notice of their right to obtain and consult with counsel before each phase of the test, written notice containing specifics of how the testing would be conducted, or an opportunity to review all questions to be asked during the test. 29 U.S.C. § 2007(b)(2)(A) through (E).

Respondent's right to lawfully conduct polygraph examinations within the prescriptions of the EPPA is not challenged. Respondent's demand that Miles and Verderber submit to polygraph examination was not the result of any legitimate investigation, however, but was motivated solely by their activities in support of the Union. As such, their terminations for refusing to submit to the exam violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act on September 27, 2000, by discharging Fernando Miranda.

4. Respondent violated Section 8(a)(3) and (1) of the Act on October 17, 2000, by discharging Leonard Miles.

5. Respondent violated Section 8(a)(3) and (1) of the Act on October 18, 2000, by discharging John Verderber.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Fernando Miranda, Leonard Miles, and John Verderber, must offer to them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their respective discharges to the date of a proper offer of reinstatement to each of them, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]